UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

LARRY WELLS, DONNA WELLS, AND CONNIE FARMER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF CHARLES FARMER	PLAINTIFFS
VS.	CIVIL ACTION NO. 3:12CV564-CWR-FKB
ROBINSON HELICOPTER CO., INC.	DEFENDANT

CONSOLIDATED WITH

WEBB GROUP, L.P.	PLAINTIFF
VS.	CIVIL ACTION NO. 3:12CV613HTW-LRA
ROBINSON HELICOPTER COMPANY, INCORPORATED	DEFENDANT

MOTION FOR PROTECTIVE ORDER

I. Introduction

1. Defendant Robinson Helicopter Company, Incorporated ("Robinson") files this Motion for Protective Order to preclude Plaintiffs Wells and Farmer from taking depositions long after discovery has closed. On May 28, 2014, Plaintiffs unilaterally noticed four depositions without leave of Court. The already extended discovery period in this case closed by Order of the Court on April 22, 2014. Plaintiffs assert that these are to be "*de bene esse*" depositions, as if that term of art matters, of some of Wells' medical providers, but Plaintiffs never properly designated them as experts pursuant to Fed. R. Civ. P. 26(a)(2)(C) and the Court's deadline for expert designations. While Plaintiffs have mentioned taking these

witnesses' depositions, they never proposed any dates, or filed any notices to do so within either of the Court-ordered discovery periods.

2. In addition to ignoring the Court's Discovery and Expert Disclosure Deadlines, Plaintiffs noticed the depositions to take place on September 10 and September 29—***after*** the Court's deadline for motions *in limine* on August 28, 2014 (fourteen days prior to the Pre-Trial Conference). While Plaintiffs may be able to call such witnesses as fact witnesses at trial, only to the extent they do not offer any expert testimony for which they have not been designated, there are simply no grounds for Plaintiffs to take their depositions long after discovery has closed.

II. Background

3. On May 28, 2014, Plaintiffs filed three notices to take the depositions of Dr. Howard T. Katz [Doc. # 167], Teresa Koerber [Doc. # 169], Tonya McClendon [Doc. # 170] on September 10, 2014, and a fourth notice to depose Dr. William B. Geissler [Doc. # 168] on September 29, 2014.

4. The original CMO [Doc. # 19] implemented a discovery deadline of October 18, 2013. The Court extended the discovery deadline by agreement of the parties to January 18, 2014 [Text Order, July 28, 2013]. In the same Text Order, the Court required Plaintiffs to Designate Experts by November 19, 2013.

5. It is true that Plaintiffs mentioned to Robinson's former counsel the possibility of taking some unidentified medical depositions in late October/early November of 2013. Robinson responded on November 7, 2013 saying, "We are open to your scheduling medical depositions in December [2013]." (Corresp. between T. Gerity and D. Desjardins, Nov. 11, 2013, Comp. Ex. "A"). The response from Wells was "I will try to line them up for mid-

December." (*Id.*). Robinson followed up with "We can schedule Mrs. Wells while you are in town for the medical depositions. Let's get the depositions on the calendar. Please let me know which doctors you intend to depose." (*Id.*).

6. On November 18, 2013, Plaintiffs' served their Disclosure of Expert Witnesses [Doc. # 64]. None of the four witnesses Plaintiffs now seek to depose were listed. Indeed, only one of the four, Dr. Howard Katz, was listed on Plaintiffs' Rule 26(a)(1) Initial Disclosures as an individual likely to have discoverable information. (Ex. "B").

7. On November 21, 2013, Wells listed these potential deponents in an email as Dr. Katz, Theresa Koerher [sic], Tonya McLendon [sic], and Dr. Geislinger [sic] and states that "I am trying to set up these medical depositions in Wells, and would like to do so with regard to your January schedule. I do not believe I ever got a response from you as to your January schedule. Please advise, lest I be forced to simply pick dates that work for the doctors." (Comp. Ex. "A").

8. On November 22, 2013, counsel for Robinson moved to withdraw. [Doc. # 67].

9. On December 17, 2013, Robinson's undersigned counsel wrote Plaintiffs and made a formal request for Plaintiffs to supplement their disclosures and discovery responses. (Ex. "C").

10. On December 23-24, 2013, the parties exchanged correspondence on this issue, the pertinent portions of which are set out below. (Comp. Ex. "D").

> Plaintiffs: "As a preliminary matter I note that we have been asking Robinson for months to work with us to schedule the depositions of Larry Wells' treating doctors. Despite no less than half a dozen requests, we have never gotten a response to our enquiries."

> Robinson: "As for the depositions of treating physicians, as you know we have only been involved in this case a short time, but have no record or recollection of you tendering to us, the current lawyers for Robinson, any specific dates for

treating physician depositions. If I am mistaken please let me know. In any event, please take note that it is our position that the plaintiffs had an obligation to disclose the treating physicians under Rule 26(a)(2)(C) F.R.C.P. We have searched and do not find such a disclosure. Accordingly, while you are tendering dates, please point us to such disclosures if one exists so that we can make a final decision as to whether those depositions will go forward at all."

Plaintiffs: "Concerning the treating physicians, I have enclosed as Exhibit "1" our multiple attempts to try and schedule these doctors. Based on your suggestion, **I will work with the doctor's schedulers, and let you know when they are available**. **In order to clear up any confusion concerning their status as expert witnesses, we intend on filing a supplemental disclosure of expert witnesses.** I would note that Mr. Wells discussed many of these doctors in his deposition testimony, and their records have been previously provided to you."

Contrary to Plaintiffs' statements above, as shown by its previous correspondence (Comp. Ex. "A"), ***Plaintiffs never provided a single date for any of the supposed "doctor" depositions*** (two of the four witnesses are not doctors) prior to the January 18, 2014, Discovery Deadline. Plaintiffs also never followed through with their promise to supplement their expert disclosures to include these individuals and the information required by Rule 26(a)(2)(C).

11. On January 14, 2014, the Court held a telephonic conference regarding various motions for protective orders and to permit destructive testing of the helicopter involved in the accident at issue. During the hearing, the Court specifically asked what was left to finish with respect to discovery, and while various depositions of experts were discussed, Plaintiffs never mentioned taking the depositions of the four witnesses they recently noticed. Regardless, the Court issued its Order on the various motions [Doc. # 96], and extended multiple deadlines, including the Discovery Deadline to April 22, 2014, and the Dispositive and *Daubert* motions deadline to May 6, 2014, and moved the Pre-trial Conference to September 12, 2014.

12. On January 28, 2014, Plaintiffs finally responded to Robinson's December 17, 2013, letter, and provided the correct names of some of Plaintiff Wells' medical providers,

including the four at issue. Like before, and despite discovery being extended until April 22, 2014, the letter once again ***did not propose any dates for any medical depositions***. Instead, Plaintiffs stated that "We intend to call the following witnesses at trial in connection with Mr. Wells' medical treatment. (Ex. "E"). The substance of their testimony can be found in the medical records." Plaintiffs' letter, however, did not provide the information required by Rule 26(a)(2)(C). And, as stated before, Plaintiffs' never supplemented their expert disclosures to list these witnesses.

13. Discovery closed by Order of the Court on April 22, 2014. The same day, Plaintiffs filed supplemental Rule 26(a)(1) disclosures, and listed these four witnesses as persons having discoverable information. (Ex. "F"). Their supplemental disclosure, however, did not provide any of the information that Rule 26(a)(2)(C) requires for experts.

14. Five weeks after the close of discovery, and without leave of Court, Plaintiffs unilaterally filed the four notices of deposition that are the subject of this motion. Besides being untimely with respect to discovery, these depositions would further violate the Court's deadlines related to *in Limine* motions (August 28, 2014) and the Pre-Trial Conference (September 12, 2014).

III. Argument and Authorities

15. Local District Court Rule 26(a)(2)(D) and Federal Rule of Civil Procedure 26(a)(2)(C) mandate that "[a] party must designate physicians and other witnesses who are not retained or specially employed to provide expert testimony but are expected to be called to offer expert opinions at trial. No written report is required from such witnesses, but the party must disclose the subject matter on which the witness is expected to present evidence under Fed. R. Evid. 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected

to testify. The party must also supplement initial disclosures." Local Rule 26(a)(2)(D). Fed. R. Civ. P. 26(a)(2)(C)(i) and (ii) (A party must disclose "the subject matter on which the expert is expected to present evidence ... and a summary of the facts and opinions to which the witness is expected to testify."). *Barnes v. BTN, Inc.*, 1:12CV34HSO-RHW, 2013 WL 1194753 (S.D. Miss. Mar. 22, 2013) *aff'd*, 555 F. App'x 281 (5th Cir. 2014) (holding that plaintiff may not offer the testimony or report of an expert who has not been properly and timely designated in accordance with the Rules or the Case Management Order).

16. Plaintiffs' deadline to designate experts passed on November 18, 2013. Plaintiffs never designated these witnesses as experts, and more importantly, never provided the information required by the rules.

17. To the extent Plaintiffs seek to only offer factual testimony of these witnesses, they cannot do so through depositions for two reasons. ***First***, these depositions would violate the Court-ordered deadlines in this case. *Lee v. Knutson*, 112 F.R.D. 105, 106 (N.D. Miss. 1986) (plaintiffs could not take the depositions of medical providers after the discovery deadline without leave of court). In *Lee*, the court was faced with a motion by plaintiffs to depose six medical providers after the discovery deadline. The court held that the plaintiffs were "too late in seeking to take these depositions, and the motion would fail for that reason alone. [And] The court does not establish deadlines merely for the purpose of extending them." *Id.* at 107.

18. ***Second***, and with respect to any assertion that these are "factual" depositions to be taken "*de bene esse*," the use of such depositions would violate Rule 32(a)(4). "The restrictions imposed by Rule 32 make it clear that the federal rules have not changed the long established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person." 8A Charles Alan

Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2142 (3d ed. 2010). Rule 34(a)(4)(E) even refers to the importance of live testimony in open court in defining when it considers a witness to be unavailable. Under the rule, an "unavailable witness" is one that: is dead; more than 100 miles from trial; cannot attend trial due to age, illness, infirmity, or imprisonment; or, cannot be subpoenaed to attend. The rule also permits "on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used." Fed. R. Civ. P. 34(a)(4)(E).

19. Here, Plaintiffs have not filed a motion or made any showing that these untimely depositions should be permitted, let alone used in place of the requisite live testimony. Moreover, the fact that Plaintiffs referred to these witnesses' potential depositions as being *de bene esse*, even before the extended discovery period and new trial date, shows that Plaintiffs have always intended to avoid the requirement of live testimony. Setting aside this impropriety, there can be no excuse for Plaintiffs' failure to timely notice and take the depositions of witnesses that they might like to have deemed "unavailable" under Rule 34.

IV. Conclusion

20. Robinson should be granted a protective order precluding Plaintiffs from taking depositions in violation of the Court's deadlines. Plaintiffs waited until after the already extended time for discovery ended to notice the depositions of their own witnesses for which they never provided proper expert disclosures or any deposition dates during discovery. Additionally, any such untimely depositions should be precluded because they will interfere with the Court's deadline for motions *in limine*, the Pre-Trial Conference, and the parties' preparation for trial.

21. Given the nature and brevity of this motion, Robinson respectfully requests that the requirement of a separate memorandum in support be waived.

This the 18th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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